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Supreme Court of the United States

October Term, 1942.

CELANESE CORPORATION OF AMERICA,
Petitioner,

—vs.—

LIBBEY-OWENS-FORD GLASS COMPANY,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States of America:

Your petitioner the Celanese Corporation of America respectfully prays for a writ of certiorari directed to the United States Circuit Court of Appeals for the Sixth Circuit to review the final judgment of that Court rendered in this action on April 22, 1943. The transcript of record is being filed herewith in accordance with Rule 41 of this Court.

Opinion Below.

The opinion and judgment of said Circuit Court of Appeals will be found at pages 1903 and 1904 of said record; the former is reported at 135 F. (2d) 138.*

* For convenience, in accordance with the opinion of the Circuit Court of Appeals, the Celanese Corporation will hereinafter be referred to as plaintiff and the Libbey-Owens-Ford Glass Company will be referred to as defendant.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 USC 347, as amended).

Questions Presented.

1. Whether patent 1,936,044 is for a novel improvement in laminated glass, or for a chemical compound.

2. Whether the said opinion of the Circuit Court of Appeals is in conflict with the decision of this Court in *Winans* v. *Denmead,* 15 Howard 330, and other decisions of this Court, following *Winans* v. *Denmead,** upon the question of infringement.

Summary Statement of the Matter Involved.

Plaintiff's predecessor in this action, the Celluloid Corporation, on October 23, 1934 filed in the United States District Court for the Northern District of Ohio its bill of complaint, charging the defendant with infringement of United States Letters Patent No. 1,936,044 issued on November 21, 1933 for *Laminated Product and Method of Producing Same.*

The claims in issue were 1 and 3 to 7 inclusive.

On June 29, 1939, the District Court appointed Amos L. Conn, Esquire, as Special Master to hear and determine the issues in the case (R. 54). The Special Master treating the patent as for a chemical composition on November 7, 1940 reported that claims 1, 3 and 4 were invalid and claims 1, 3, 4, 5, 6 and 7 were not infringed (R. 1847), and that claims 5, 6 and 7 were valid (R. 1836) but not infringed (R. 1842, 1843).

Upon the questions of confirmation of the Special Master's report before the Honorable Leslie R. Darr, District Judge, the Court on July 10, 1941, treating the

* *Smith* v. *Snow,* 294 U. S. 1, 14.

patent as a novel improvement in the art of laminated glass overruled the report of the Special Master, held the patent valid and infringed and directed the entry of the usual interlocutory decree holding validity and infringement and ordering an accounting for profits and damages.

Judge Darr's opinion and decree will be found at R. 1866 and 1882.

Upon appeal from Judge Darr's decree the Circuit Court of Appeals treated the patent as a patent for a chemical compound and held it anticipated. The Court also held that defendant having exceeded the proportions of plasticizer specified in the claims in suit did not infringe. Other grounds in support of its finding are referred to in the opinion and will be considered hereinafter.

Reasons Relied Upon for the Allowance of the Writ of Certiorari.

(1) Because the Circuit Court of Appeals for the Sixth Circuit has departed from the fundamental basis that the issue in the patent suit is the *invention as set forth in the patent,* and has decided the case as though the patent were for some new chemical composition, whereas Walsh made no claim for a new chemical composition.

(2) Because the Circuit Court of Appeals for the Sixth Circuit in finding that the claims in suit were not infringed relied upon the defendant's use of a small excess of plasticizer over that specified in the claims, whereby the defendant merely carried Walsh's teachings slightly further without change in function or mode of operation, the slight increase being merely verbal, but not functional. In so doing the Court rendered a decision in conflict with the decision of this Court in *Winans* v. *Denmead*, 15 Howard 330, and other subsequent decisions of this Court.

(3) Because the Circuit Court of Appeals for the Sixth Circuit in rendering its decision did not give effect to the fact that Walsh brought to the art a novel laminated

glass, including for the first time in such art a soft, rubberlike interlayer between the glass plates, whereby the interlayer accommodated itself to irregularities in the glass, yielded to blows upon the glass and spread the shock over greater area; that his invention was immediately adopted by the defendant and has proven to be a valuable step in the laminated glass art. The Walsh patent is not unduly broad but covers only a definite field and the defendant has made use of the Walsh invention within that field.

Dated July, 1943.

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